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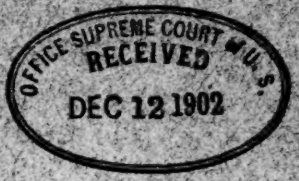

Supreme Court of the United States

No. 90.
October Term, 1902.

ANTON MENCKE,
Libelant, Petitioner,

vs.

A CARGO OF JAVA SUGAR EX SHIP BENLARIG, WHEREOF ARBUCKLE BROTHERS ARE
Claimants, Respondents.

Motion for Rehearing.

WILHELMUS MYNDERSE,
Counsel.

Supreme Court of the United States.

ANTON MENCKE, *Petitioner,* AGAINST A cargo of Java Sugar *ex* ship BENLARIG, James N. Jarvie and others, *Respondents.*	October Term, 1902. No. 90.

Now come the respondents in the above entitled action and pray this Court for a rehearing of this cause, and that the issuance of the mandate of this Court be withheld meantime.

Dated New York, December 15, 1902.

SUPREME COURT OF THE UNITED STATES.

ANTON MENCKE,
Petitioner,

AGAINST

A cargo of Java Sugar *ex* ship BENLARIG, James N. Jarvie and others,
Claimants.

The motion of the claimants for a rehearing is based upon apparent errors of fact in the opinion of the Court.

First.—The opinion construes the charter as though it stipulated absolutely for a "safe port" of discharge and for a "safe" berth in such port.

The charter, however, stipulated for a "safe port" only in the event of the vessel being sent to the United Kingdom, or to the Continent between Havre and Hamburg.

Such a condition was not made respecting New York.

New York was a specifically named port, and the *Benlarig* bound herself to go there, "or as near thereto as she could safely get." She actually entered the port, and thereby all questions as to its approaches were determined.

Having reached the port, she found her further engagements exactly defined by the charter. They were that the vessel should deliver her cargo "always afloat in a "customary place and manner in such dock as directed "by charterers."

That was the whole contract so far as action in the port of New York was concerned.

There was no engagement that the dock thus selected should be a "safe" dock for the *Benlarig*, except in respect of draft of water.

The contract was not casual. It was in a standard form, the ripe fruit of commercial experience, without an idle or careless word.

It stated its meaning exactly.

The cargo was exclusively sugar, and the charter aimed to secure its delivery in the sugar district of the port.

Therefore, the engagement was made for delivery in a "customary place."

That was the dominant purpose of the charter.

Ordinarily a "customary place" would be a safe place, and in fact the berth designated for the *Benlarig* was safe, both in itself and in its approaches, for nearly every vessel in the world.

The largest vessels go there.

Any vessel entering upon such a charter takes the risk that the designated berth, though a customary one, may not be safe for *her*.

If the approaches to the designated place of delivery were not safe for the *Benlarig* because of the extraordinary peculiarities of her construction, that was her risk.

The *letter* of the contract, and the *spirit* of the contract required her to make delivery in a customary place so long as the depth of water should suffice.

We respectfully submit that the ordinary meaning of the language employed warrants no other construction.

Second.—The lighterage clause has been severely applied by the Court.

The clause is subsidiary to the principal engagements of the charter, and relates only to lighterage in ordinary course, to lighterage which is contemplated by the parties.

It does not relate to lighterage incurred solely by reason of the ship's default.

The expenses to which the consignees of the *Benlarig's* sugars were subjected in taking the sugars to their refinery were not within the provisions of the charter relating to lighterage.

Those expenses were purely and simply damages for the ship's breach of a leading engagement of the charter.

The damages chanced to be measured by the cost of lighterage. That might just as well have been measured by the cost of drayage or by tramway charges, and, but for good fortune, they might have been increased by physical injury to the sugars.

Third.—The Court has erred in understanding that "in a few instances" the topmasts of vessels have been taken down to permit them to pass under the bridge.

The housing of the top-gallantmasts of vessels is an every day occurrence and has been a constant recognition by vessels destined to the sugar and oil districts of the port, of the pressure of their contracts.

In a few instances where the vessel carried a jiggermast too tall to go under the Bridge, the jiggermast has been cut, the upper sections of the other masts being housed.

Warrant for this motion seems to be found,

First.—In the serious prejudice to a great section of our most important port by classing it as unsafe, because not accessible to a freakishly designed vessel.

Second.—In the practice and custom of merchants under like charters established through the twenty years that the Brooklyn Bridge has existed.

Third.—Because similar questions can never be brought before this Court except by *certiorari*, and therefore they will practically be determined by the decision herein.

Respectfully submitted,

WILHELMUS MYNDERSE,
Proctor for Respondents.

I certify that I am counsel for the respondents, that I have considered the grounds upon which the motion for a rehearing is based and consider such grounds substantial.

Counsel.